Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1205

GEORGE J. FULTON,
Petitioner,

vs.

ISADORE HECHT, *et al.,*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

HERBERT L. NADEAU
150 S.E. 2nd Avenue
Suite 300
Miami, Florida 33131

and

DANIEL G. LAPORTE
1500 I Cascade Plaza
Akron, Ohio 44308
Counsel for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Citations II

Restatement of the Case by Respondents 1

Chronology of the Case Below 1

Factual Summary 3

Reasons for Denying the Writ 8

1. Petitioner's Construction of the Decision Below Is Not Correct 8
2. The Decision Below Is in Accord With *Deesen v. Professional Golfers Association of America*, 358 F.2d 165 (9th Cir.), *Cert. Denied*, 385 U.S. 846 (1966) 11
3. The Decision Below Is in Accord With the Prior Decisions of This Court and Raises No Novel or Significant Questions Concerning the Interpretation of the Sherman Act, §2 15

Conclusion 16

TEXTUAL REFERENCES

R.—Refers to the Original Record of Pleadings, etc. in the proceedings below before the Fifth Circuit Court of Appeals.

A.—Refers to the Appendix in the proceedings below before the Fifth Circuit Court of Appeals.

P.—Refers to the Petition for Writ of Certiorari.

PA.—Refers to Appendix to the Petition for Writ of Certiorari.

CITATIONS

Cases

Ace Beer Distributors, Inc. v. Stroh Brewery Company, 318 F.2d 283 (6th Cir. 1963), *cert. den.*, 375 U.S. 922 13
Banana Distributors, Inc. v. United Fruit Company, 162 F. Supp. 32 (S.D.N.Y. 1958) 10
Brown Shoe Company v. United States, 370 U.S. 294 15
Deesen v. Professional Golfers Association of America, 358 F.2d 165 (9th Cir.), *cert. den.*, 385 U.S. 846 (1966) 11, 12, 13
Lorain Journal Company v. United States, 342 U.S. 143 (1951) 9
Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974) 14
United States v. Colgate & Co., 250 U.S. 300 (1919) 9, 16
United States v. Grinnell Corp., 384 U.S. 563 (1966) 9
United States v. E. I. duPont deNemours & Company, 351 U.S. 377 (1955) 13
United States v. Parke Davis & Co., 362 U.S. 29 (1960) 16

Statutes

Sherman Act, Sec. 1, 15 U.S.C. 1 ..... 2, 3, 11, 12
Sherman Act, Sec. 2, 15 U.S.C. Sec. 2 ..... 1, 2, 3, 8, 9, 11, 12, 13, 15, 16

Supreme Court of the United States

October Term, 1978

No. 78-1205

GEORGE J. FULTON,
Petitioner,

vs.

ISADORE HECHT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

RESTATEMENT OF THE CASE BY RESPONDENTS

Due to inaccuracies and omissions in Petitioner's Statement, Respondents are forced to completely restate the case and facts.

CHRONOLOGY OF THE CASE BELOW

Petitioner's Application for Writ is taken from that portion of the Fifth Circuit's Decision of September 20th, 1978 affirming a directed verdict in favor of Respondents on a Sherman Act §2 charge granted by the District Court for the Southern District of Florida in March, 1976. The District Court had entered judgment pursuant to a special verdict returned by a jury following a trial of eight days' duration concerning alleged Sherman Act §1 violations.

Respondents are Florence Hecht, Melvin N. Greenburg, Marshall N. Feuer and Samuel Gordon, all as executors of the estate of Isadore Hecht, a deceased general partner of West Flagler Associates, Ltd., a Florida limited partnership, and David Hecht, Sidney Lefcourt, Isabel Amdur and Barbara Hecht, also general partners of the same limited partnership. All were sued as such general partners.

The partnership operated West Flagler Kennel Club, a greyhound racing track in Dade County, Florida. The general partners, the partnership, and the dog track will hereafter be collectively referred to as "Flagler".

Petitioner Fulton ("Fulton") is an owner, breeder, and operator of racing greyhounds. On September 1, 1972, three days before his booking contract to race greyhounds at Flagler expired, Fulton filed his original Complaint in the Southern District of Florida. The substance of this Complaint was that Flagler had not renewed the booking contract because Fulton had testified at a Florida Board of Business Regulation hearing on February 11, 1972, which resulted in choice summer racing dates being awarded to another dog track, Biscayne Kennel Club.

Neither the original Complaint nor the First Amended Complaint mentioned any violation of the Sherman Act. On March 1, 1974, Fulton filed his Second Amended Complaint (R. 695). Count I of the Second Amended Complaint contained a 42 U.S.C. §1983 Civil Rights Count; Count II contained the Sherman Act §1 charge, and Count III contained the Sherman Act §2 charge. No mention was made of the identity of any conspirator other than Flagler.

In January, 1975 the allegation that the Sherman Act was violated due to the 1970 Florida Kennels, Inc. policy first surfaced in a unilateral pre-trial stipulation filed by Fulton. In May, 1975 Fulton first disclosed the identity of

the alleged co-conspirators by filing a list in the District Court which included the other Miami area dog tracks, Miami Beach Kennel Club, Biscayne Kennel Club and Hollywood Kennel Club and certain of their officials.

The District Court took testimony on the §1983 State Action Issue and ruled against Fulton. An expedited appeal was taken to the Fifth Circuit which affirmed the District Court (545 F.2d 540) and certiorari was denied (430 U.S. 984).

The alleged Sherman Act violations were tried to a jury on March 1-10, 1976. At the conclusion of Fulton's evidence on liability, Flagler moved for a directed verdict, which the Court granted only as to the §2 Sherman Act claim. The jury thereupon returned a verdict on the Sherman Act §1 count in favor of the Respondents and final judgment was entered by the District Court. An appeal on both of the Sherman Act and certain other issues ensued to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the District Court in all respects and Petitioner's Application for Writ followed.

FACTUAL SUMMARY

Flagler has operated a pari-mutuel greyhound racing track in Dade County, Florida, for many years. It is allocated 109 racing days each year by order of the State of Florida Board of Business Regulation. The other two dog tracks in Dade County, Florida, Biscayne Kennel Club and Miami Beach Kennel Club, are also allocated 109 days apiece (A. 335, 428).

Because no racing is allowed on Sunday, the racing dates of the three Dade County dog tracks overlap to a certain extent (A. 336-337).

Hollywood Kennel Club, operating in southern Broward County, Florida, immediately north of Dade County, is free to operate at any time and consequently is always running at the same time as one of the three Dade County tracks. Dade County tracks may also run in opposition to each other (A. 665). In addition to competition from other dog tracks, Flagler competes directly with three horse tracks and two jai alai frontons in the Dade-Broward County, Florida, area for the public's betting dollars (A. 448).

Over the years, Flagler has pioneered innovations in greyhound racing such as racing over longer distances (7/16ths or 9/16ths of a mile instead of 5/16ths), commonly referred to as "marathons", hurdle racing and also daytime racing in competition with flat track horse racing, commonly referred to as "matinees" (A. 388, 392).

Greyhound tracks do not own their own greyhounds but contract with independent dog owners who agree to furnish an agreed number of animals for all kinds of racing at the track for agreed periods of time, in return for an opportunity to win a portion of the betting pool belonging to the track. Such contracts are commonly known as booking contracts (A. 667). These contracts usually contain no provision for automatic renewal and coincide with one or more greyhound racing seasons lasting from September of one year through August of the next year (A. 456-458).

Flagler generally contracts with thirty-two different dog owners for its racing meets and this was the case during the 1971-72 racing season (A. 384).

Fulton had raced at Flagler under booking contracts since late 1957 (A. 185). Among his fellow dog owners he had a reputation as the "uncrowned champion griper in

America" (A. 309), and was a "problem child" from Flagler's viewpoint (A. 514). This stemmed chiefly from Fulton's acknowledged aversion and reluctance to furnish animals for the innovations which Flagler had introduced into greyhound racing—matinees, marathons and hurdle racing (A. 201, 515, 397) and his complaints in various public fora on these subjects (A. 201-203).

On February 11, 1972, Fulton was subpoenaed by Biscayne Kennel Club to testify before the Florida Board of Business Regulation at the Dade County Courthouse, Miami, Florida. One of the items on the agenda was the allocation of Summer racing dates for the 1972-73 racing season. All of the Dade County greyhound racing tracks had requested racing dates for this period. Fulton's testimony was neither harmful to nor in favor of either Biscayne or Flagler (A. 394, 513) although Fulton did mention that he did not like matinee racing which both tracks offered (A. 201).

Testimony conflicted as to what occurred immediately after the Board of Business Regulation hearing, with Respondents' witnesses generally denying that Isadore Hecht, a general partner of Flagler, now deceased, used foul language while in effect telling Fulton that he was going to sever their business relationship (A. 208). Testimony also differed as to Fulton's advance knowledge of the nonrenewal of his booking contract at Flagler.

However, on July 30, 1972 Fulton received a letter from Flagler notifying him that his booking contract, which would expire on September 4 of that year, would not be renewed (A. 229).

Fulton appeared to admit that the relevant market for his business of selling his greyhounds' racing services was considerably broader than the Dade-Broward

County area admitted as the relevant market by his counsel (A. 92, 98).

Fulton testified that in addition to racing at Flagler during the summer of 1972, he was, in accordance with past practice, also racing a kennel of greyhounds at the Daytona Beach Kennel Club in Volusia County, Florida (A. 231). He testified that on September 4, 1972, he had between thirty-six (36)and thirty-eight (38) greyhounds in Dade County, Florida, from the Flagler meeting and an equal number at Daytona Beach (A. 234).

Fulton kept the dogs he was racing at Flagler at Florida Kennels, Inc., a common holding compound, the corporate shares of which were owned equally by the four Dade-Broward County dog tracks. Florida Kennels, Inc. leased a total of 35 kennel buildings to dog owners while they were racing at the local tracks (A. 669). John Travis, then General Manager of Florida Kennels, Inc. informed Fulton that since he no longer had booking contracts at all four local tracks, he could not retain two kennels on a full-time basis and he would have to vacate one of his two kennel buildings (A. 238). The reason given was the policy decision made by the Executive Committee of Florida Kennels, Inc. in 1970 to the effect that dog owners having one or more but less than 4 booking contracts would be eligible for only one kennel building. The policy had been instituted because of a shortage of kennel buildings that had developed over the years (A. 669). However, this policy specifically provided that:

> "For special circumstances, such as conflicting dates, please contact the manager and your case will be reviewed by the Executive Committee." (A. 668)

Fulton made no such request (A. 239). Yet Perrine Palmer, an officer at Hollywood Kennel Club, testified

that had Fulton come to him during the Fall of 1972, he would have seen that Fulton had more kennel space because he had contracted to race at both Miami Beach and Hollywood during the winter of 1972-73 (A. 482).

Travis did recall that there was a need for kennel space because of Flagler's Fall meeting and because of Hollywood Kennel Club's upcoming meeting (A. 322). The Flagler meet started on September 3, 1972 and ran through January 3, 1973. Hollywood began December 26, 1972 and ran through May 2, 1973, and Miami Beach began January 4, 1973 and ran through May 4, 1973 (A. 665).

Fulton could not recall whether there were any vacant kennels in September, 1972 (A. 239). The need for space was corroborated by Carl Hoffman of Miami Beach Kennel Club, one of the organizers of Florida Kennels, Inc. (A. 438) and by Perrine Palmer, an officer of Hollywood Kennel Club and Florida Kennels, Inc. (A. 478).

The record adequately demonstrates that, contrary to Fulton's assertion that it was an economic necessity for a greyhound owner to race at all four Dade-Broward County area tracks, there were more dog owners kenneling at Florida Kennels, Inc. who had three or fewer booking contracts at the area tracks than those who had four contracts. A comparison of the rosters of dog owners racing at each of the four area dog tracks during the 1971-72 season (A. 672) reveals that there were fifteen (15) dog owners not racing at Flagler who raced at one of the other three dog tracks. These fifteen dog owners each had less than four booking contracts at the four area tracks and thus were entitled under the 1970 policy to one kennel at Florida Kennels, Inc. Consequently for Mr. Fulton to have retained two kennels would have deprived one or more of these individuals of any kennel space at all at Florida Kennels, Inc.

Nor is Fulton's assertion that his business was severely disrupted through the application of the four contract/two kennel policy was supported by the record. Although he requested and received a release from his booking contract at Miami Beach Kennel Club beginning January 4, 1973, nevertheless he did keep his contract at Hollywood for the meet beginning January, 1973 and continuing through May 2, 1973 and in 1974 also. He also kept his booking contract at Biscayne Kennel Club for the meet beginning May 5, 1973, and continuing through November 6, 1973 and also in 1974 when he leased his booking to another dog owner (A. 371). Fulton started racing again at Miami Beach in 1975 and he continued to run at Hollywood in 1975 (A. 374). He continued to race at Miami Beach in 1976 and at Hollywood in 1976 (A. 379). He did not race at Biscayne in 1975 or in 1976 (A. 377) because his contract expired at the end of the 1974 meeting and he did not renew it as he had changed his area of work to the dog tracks in Massachusetts (A. 380). During the subsequent years when he had bookings at both Hollywood and a Dade County track operating at the same time, he requested and was provided with two kennels at Florida Kennels, Inc. (A. 539, 540, 544).

REASONS FOR DENYING THE WRIT

1. PETITIONER'S CONSTRUCTION OF THE DECISION BELOW IS NOT CORRECT.

Petitioner clearly misconstrues the Fifth Circuit's decision below on the §2 count when he states that:

> "The Fifth Circuit has here held that the exercise of monopoly power is violative of §2 of the Sherman Act only when such exercise has an anti-competitive effect on competitors of the one wielding such power." (P. 8)

Nowhere is such an assertion made in the entire opinion below.

The Court of Appeals first analyzes Petitioner's unproved assumption that Flagler had monopoly power in the relevant market (PA. 5a-7a) which underlays each branch of Petitioner's §2 argument. While casting doubt on the existence of monopoly power the Court below concluded that Petitioner's argument for the existence of monopoly power need not be evaluated because no evidence was presented by Petitioner that Flagler used whatever power it had to enhance or maintain its position. Thus Petitioner could not come within the exception to the *Colgate* doctrine ("in the absence of any purpose to create or maintain a monopoly") and thus Flagler was free to exercise its independent discretion as to parties with whom it would deal. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See *United States v. Grinnell Corp.*, 384 U.S. 563 at 570-571 (1966); *Lorain Journal Company v. United States*, 342 U.S. 143 (1951). The Court below reasoned that any monopoly power which Petitioner possessed, it had because of the quasi-exclusive nature of its allocation of racing dates which were thrust upon it by the Florida Board of Business Regulation, a position which Flagler would have whether or not Petitioner raced at its track (PA. 7a-8a).

The foregoing analysis was the basis for the Fifth Circuit's decision on the §2 count.

The balance of the Fifth Circuit's opinion on the §2 count (PA. 9a-11a), although perfectly proper, may be regarded as dictum since the Court, out of courtesy to the Petitioner, merely attempts to meet the alternative

argument of Petitioner to the effect that a monopolist has a duty to deal fairly with anyone who seeks to compete in a subjacent* market by having reasonable rules and regulations governing admittance to and exclusion from the market regardless of whether the monopolist competes there or not.

Yet even in this gratuitous analysis, the assertion that Petitioner would have the Fifth Circuit utter, i.e. that a monopolist is free to do anything so long as there is no anti-competitive effect among competitors of the monopolist, is not made. The Fifth Circuit does dwell on the fact that there is no competition between Flagler and Fulton simply because the exclusion of Fulton from the Flager track is the sole anti-competitive effect claimed by Fulton either on an actual or a potential basis.

It should be emphasized that Fulton never alleged or attempted to prove that Flagler used its position as the holder of quasi-exclusive racing dates to control what would be the price for dog racing services, i.e. the prize money or the portion of the pari-mutuel pool which the dog owners raced for and which was the consideration underlying the booking contracts. Obviously, if price maintenance were an issue, actual competition between the monopolist and the members of the subjacent market would not be relevant. The whole line of the so-called "sole source" cases such as *Banana Distributors, Inc. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958) relies

*Petitioner lacks precision in the use of the terms "subjacent market" and "adjacent market". Respondents will use the term "adjacent market" to depict a separate market lateral to the alleged monopolist and in which the monopolist also competes. Respondents will use the term "subjacent market" to describe a market in the vertical distribution scheme from the alleged monopolist which contains businesses competing among themselves but not with the alleged monopolist, but which otherwise deal with the monopolist.

upon the monopolist's power to control prices charged by members of a subjacent market to customers further on in the distribution scheme, which power has the inevitable effect of suppressing competition among such subjacent members. However, Petitioner never raised this issue and never introduced any evidence on this point. Consequently the Fifth Circuit could concentrate on situations where competition is directly affected by the power to exclude and, logically, such a situation arises only among actual competitors. Petitioner has always relied upon the so-called "trade association" line of cases such as *Deesen* and this reliance, as the Fifth Circuit has pointed out, is misplaced.

2. THE DECISION BELOW IS IN ACCORD WITH DEESEN V. PROFESSIONAL GOLFERS ASSOCIATION OF AMERICA, 358 F.2d 165 (9th CIR.), CERT. DEN., 385 U.S. 846 (1966).

Having destroyed the straw man Petitioner attempts to create out of the Fifth Circuit's decision, obviously the *Deesen* case does not conflict with the decision below.

In the *Deesen* case, the Ninth Circuit was faced with three separate contentions, as follows:

1. A Sherman Act §1 charge that the P.G.A.'s Rules and Regulations for entrance to P.G.A. tournaments were unreasonable restraints of trade;

2. A combination §1-§2 claim that the P.G.A. and its members *attempted* to combine and conspire to monopolize commerce and boycott Deesen in order to keep him from participating; and

3. Finally, a §2 claim, standing alone (*Id.* at 171) and which the decision below discussed, to the

effect that the P.G.A. constituted an *actual* monopoly because it sponsored or co-sponsored all professional golf tournaments, to enter one of which one had to be a P.G.A. member or a P.G.A. approved player, and thus the P.G.A. had the power to exclude a player for no reason whatsoever.

The Ninth Circuit reasoned that the possession of such exclusionary power was all right so long as it did not destroy competition. Obviously, the Ninth Circuit did not feel that the actual exclusion of Deesen amounted to a restraint of competition in general. The Ninth Circuit was thus distinguishing between the private injury to Deesen and the public injury to competition which the Sherman Act is designed to protect.

Like the case at bar, no evidence was introduced (except for Deesen's exclusion) of any suppression of competition whether in an adjacent, lateral market (the business of sponsoring golf tournaments) or in the subjacent, vertical market of competition among individual golfers.

The Ninth Circuit in fact does not discuss the necessity of having any rules governing admittance or exclusion from the subjacent market when it is discussing the sole §2 charge. Any discussion of the reasonability of such rules is found in the discussion of the §1 count or the combined §1-§2 count.

The Ninth Circuit concludes its discussion of the sole §2 charge by stating:

> *"Speaking only with regard to the evidence of record in this case,* we hold that the trial court did not err in finding and concluding that P.G.A. did not use its power in a way which is violative of §2 of the Sherman Act." *Id.* at 171 (Emphasis supplied.)

Thus, the Fifth Circuit in the case below was on solid ground when it said that the *Deesen* decision should be limited to the circumstances of that case.

What both the Ninth Circuit in *Deesen* and the Fifth Circuit in the case below imply in common is that private injury is not sufficient to prove the public injury necessary for a violation of §2 of the Sherman Act. The power to exclude a competitor in a subjacent market is the threat of a private injury unless there is power to maintain prices or some other power which would foreclose competition in the subjacent market. Such facts were entirely absent from the case below. The matter of private versus public injury was summarized in *Ace Beer Distributors, Inc. v. Stroh Brewery Company,* 318 F.2d 283 at 287 (6th Cir. 1963), *cert. den.,* 375 U.S. 922, as follows:

> "The fact that a refusal to deal with a particular buyer without more may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.
>
> The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise.
>
> It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States v. E. I. duPont deNemours & Company,* 351 U.S. 377, 76 S.Ct. 994, 100 L.ed. 1264.
>
> . . . .

> The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade."

In the final analysis Petitioner's alternative argument depends upon his definition of the relevant market to include only the Flagler dog track. A similar severe restriction of the relevant market was discussed and rejected by the Seventh Circuit in *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974) where the severe gasoline shortages of 1973 led to exceptional federal regulatory controls and thus exacerbated the plaintiff distributor's problem when he was terminated by Arco since he could not find another source of gasoline. The Seventh Circuit discussed the relevant market in such a situation as follows:

> Although exceptional regulatory controls may significantly restrain competition within the relevant market, we do not believe they justify a redefinition of the market. For the various brands of gasoline would retain the physical characteristics that make them readily interchangeable for essentially the same uses. Indeed such factors as advertising of particular brands, which tend to differentiate otherwise similar products, become less significant in times of shortage. Whether viewed from the standpoint of the ultimate consumer, or of a distributor such as plaintiff, it would be less important to obtain a particular kind of gasoline than to purchase any gasoline at all. The so-called 'cross elasticity of demand' would tend to enlarge the relative product market as the competition among buyers of petroleum.

> The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased. For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of *competition*, not competitors.' [*Brown Shoe Company v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.ed. 2d 510] . . .
>
> If the artificial restraints imposed by the government during a period of shortage make it appropriate to characterize Arco as a monopolist for purposes of construing the Sherman Act, it would seem to follow that each of the twenty other oil companies, and perhaps each of the independent jobbers who sell to retail service stations in the same area, is equally a monopolist. For conceivably if the shortage is sufficiently acute, any one of these distributors might have the power—assuming that no contract or regulatory objection interferes—to discontinue sales to a retailer and, therefore, to put him completely out of business. If such action were violative of §2 the Sherman Act would, in effect, outlaw any change in existing patterns of distribution until after an acute shortage was ameliorated." 502 F.2d 290 at 298-299.

3. THE DECISION BELOW IS IN ACCORD WITH THE PRIOR DECISIONS OF THIS COURT AND RAISES NO NOVEL OR SIGNIFICANT QUESTIONS CONCERNING THE INTERPRETATION OF THE SHERMAN ACT, §2.

No novel or significant problem is raised by the facts of this case. This Court has often considered the threat to competition constituted by the existence of a monop-

olist with regard to businesses in a vertical subjacent market. Indeed the whole line of cases restricting the *Colgate* doctrine with regard to its application to resale price maintenance, a subject which has never been an issue in this case, falls within this area. See *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960).

What Petitioner would have this Court do is overrule *United States v. Colgate & Company* in its entirety and thus bring to each private contract in this country a new dimension, namely, that where differences in bargaining power exist, a Federal Court will automatically reform the contract under §2 of the Sherman Act.

CONCLUSION

For all of the foregoing reasons, the Application for the Writ of Certiorari by Petitioner should be denied.

Respectfully submitted,

HERBERT L. NADEAU
150 S.E. 2nd Avenue
Miami, Florida 33131

DANIEL G. LAPORTE
1500 I Cascade Plaza
Akron, Ohio 44308
Counsel for Respondents